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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-540

CECIL STATHAM, Petitioner,

vs.

W. STANLEY RIDDLE, JR., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sept. 18, 1973

Petitioner, Cecil Statham, prays that a writ of certiorari issue to review the judgment and opinion of the U. S. Court of Appeals for the Ninth Circuit entered in this case on August 7, 1973, affirming the judgment of the U. S. District Court; and that, on hearing, the judgment be reversed and entry of the proper judgment be directed.

OPINIONS BELOW

The opinions of the courts below (all of which are reproduced in the Appendix at the end of this Petition) are as follows: opinion of the Court of Appeals, expected to be reported very soon in __ F.2d __; District Court's Judgment Affirming Judgment of Referee (Tr. 139) (unreported); and Judgment of the Referee in Bankruptcy, contained in his Findings of Fact, Conclusions of Law and Judgment (Tr. 43) (unreported).

JURISDICTION

The Opinion of the Court of Appeals, now sought to be reviewed, was entered on

August 7, 1973. On September 4, 1973, the Court of Appeals entered an Order Staying Issuance of Mandate, allowing Petitioner until September 27, 1973 to file this Petition in the Supreme Court. The statute invoked as the basis of the Supreme Court's jurisdiction to review this case is 28 U.S.C., sec. 1254(1) (62 Stat. 928) (1948).

QUESTIONS PRESENTED

The various questions involved in a review of this case are all set forth as follows, although only one of them will be discussed in this Petition:

1. Under the applicable test, does the provision of the Washington homestead-exemption statutes which confines the exemption to heads of families unreasonably discriminate against single persons without dependents, in violation of the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution?
   a. Assuming, ~~arguendo~~, that only the minimal test is applicable, do the Washington homestead-exemption statutes fail to meet that test?
   b. What should be the applicable test in a case not quite reaching Constitutional dimensions, but involving fundamental personal rights? (Is the present case such a case, and do the Washington statutes fail to meet the applicable test?)
2. If the unconstitutional provision of the Washington statutes is deleted, can

their remaining provisions validly stand as the entire homestead enactment, being construed as granting a homestead exemption to all persons, in the same maximum amount?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this case is sec. 1 of the Fourteenth Amendment to the U. S. Constitution, which provides: ". . . [N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws."

The statutory provisions involved in this case are the five relevant general homestead-exemption statutes of the Revised Code of Washington (R.C.W.)--namely, secs. 6.12.010, -.020, -.050, -.090, and -.290. The three of them not involving the constitutional question will be quoted in the Appendix at the end of this Petition. The two involving the constitutional question (R.C.W. 6.12.020 and 6.12.290) are quoted, respectively, as follows:

> "From what it may be selected. If the claimant be married the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property. When the claimant is not married, but is the head of a family within the meaning of RCW 6.12.290, the homestead may be selected from any of his or her property. [1895 c 64 sec. 2. . . .]"

""Head of family" defined. The phrase "head of the family," as used in this chapter, includes within its meaning--

"(1) The husband or wife, when the claimant is a married person; or a widow or widower still residing upon the premises occupied by her or him as a home while married.

"(2) Every person who has residing on the premises with him or her, and under his or her care and maintenance, either--

"(a) His or her minor child or grandchild or the minor child or grandchild of his or her deceased wife or husband.

"(b) A minor brother or sister or the minor child of a deceased brother or sister.

"(c) A father, mother, grandmother or grandfather.

"(d) The father, mother, grandfather or grandmother of deceased husband or wife.

"(e) An unmarried sister, or any other of the relatives mentioned in this section who has attained the age of majority, and are unable to take care of or support themselves. [1933 c 36 sec. 1. . . .]"

STATEMENT OF THE CASE

Petitioner, Cecil Statham (age 57), lives in a housetrailer permanently affixed to land in which he owns an equity, in Kent, Washington. He is--and always has been--a single man without dependents.

Mr. Statham duly claimed that land and housetrailer as exempt, as his homestead, in the following two documents: a Homestead

Declaration which he executed and recorded on August 17, 1970, and a voluntary Petition for Bankruptcy which he filed on the following day.

Respondent, W. Stanley Riddle, Jr., who is Trustee in Bankruptcy in the present case, filed an Amended Report of Exempt Property (Tr. 21), disallowing Mr. Statham's claim of homestead, and scheduled a sale of the property in question. We filed Objections to Sale of Property (Tr. 20). (Mr. Statham received his Discharge of Bankrupt on December 7, 1970.)

Our Objections came on for hearing, on January 13, 1971, before Frank R. Freeman, Referee in Bankruptcy (Bankruptcy No. 67975). Counsel entered into an oral stipulation of agreed facts. Our contention that the Washington homestead-exemption statutes violated the Equal Protection Clause was rejected by Referee Freeman, in his oral decision, which was later embodied in his Findings of Fact, Conclusions of Law and Judgment (Tr. 43), entered on February 8, 1971. The Judgment denied our Objections, and awarded the property to the Trustee, free of any homestead-claim of Mr. Statham's.

Mr. Statham filed a Petition for Review (Tr. 70), invoking 28 U.S.C., sec. 1343(3) (71 Stat. 637) (1957) as the basis for jurisdiction of the U. S. District Court, to redress the deprivation, under color of State statute, of the right to the equal protection of the laws granted to him by the U. S.

Constitution. Referee Freeman filed two certificates on review (Tr. 76 and 134), reaffirming his ruling, and stating that the Washington homestead-exemption statutes "do not unlawfully and unfairly discriminate against a single man without dependents in violation of either the United States or the Washington Constitution."

The review was heard by District Judge William T. Beeks, at Seattle. On December 14, 1971, Judge Beeks entered his Judgment Affirming Judgment of Referee (Tr. 139).

Thereupon, Mr. Statham made timely appeal (Tr. 141, 142) to the U. S. Court of Appeals for the Ninth Circuit. Counsel entered into a written Stipulation and Agreed Statement as to Transcript of Proceedings (Tr. 143).

On August 7, 1973, the Court of Appeals entered its Opinion, affirming Judge Beeks' Judgment. Mr. Statham now petitions the Supreme Court to grant certiorari to review the Court of Appeals' decision. No dispute exists as to any facts in the present case.

REASONS FOR GRANTING THE WRIT

The listing of questions presented for review, at pp. 2-3 of this Petition, indicates that there are two main questions, the first of which is subdivided into two sub-questions. We will not discuss, in this Petition, the first sub-ques-

tion, because it is not essential. And we will not discuss the second main question, because, although essential, it is not of public importance. An ample discussion of it can be found in the 50-page brief we submitted, for appellant, in the Court of Appeals, and the three briefs (totalling 75 pages) we submitted in the bankruptcy- and district-courts (which are a part of the Record on Appeal, on file in the Court of Appeals). Nor do we expect to submit to the Supreme Court any brief in reply to Atty. Riddle's brief opposing certiorari.

The only question we will discuss in this Petition concerns the applicable test in a case not quite reaching Constitutional proportions. This question potentially affects about 25 million people, because it is not restricted to bankrupts; it affects all debtors who are unmarried and have no dependents, because it involves general, State homestead-exemption laws. This is so because a bankrupt gets only those exemptions given, under State laws, to all debtors--bankrupt and non-bankrupt, alike. 11 U.S.C., sec. 24 (52 Stat. 847) (1938); Hanover National Bank v. Moyses, 186 U.S. 181 (1902), p. 190. Almost 16% of the population of this country are unmarried persons without dependents. 27 Law and Contemporary Problems 22 (1962), p. 23. By statute, homestead-exemptions are confined solely to heads of families, in about 42

States (including Washington). We have quoted or cited the five governing Washington homestead-exemption statutes, at pp. 3-4 of this Petition.

These Washington statutes confine the homestead-exemption to the "head of a family", which they define so as to exclude all single persons without dependents (unless they happen to be widow(er)s still residing in the marital home). Thus, whereas the "head of a family" gets a maximum homestead-exemption of $6,000 (now increased to $10,000), a single person without dependents, such as Mr. Statham, gets nothing.

(It might be worth mentioning, with regard to the term "householder"--which is synonymous with the term "head of a family" --that the Food Stamp Act, now codified as 7 U.S.C., sec. 2012(e), as amended 1971, has always declared that "the term 'household' shall also mean a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption." Moreno v. U. S. Dept. of Agriculture, 345 F.Supp. 310 (U.S.D.C., D.C., 1972), pp. 311-312, nn. 1-2.)

In the present case, Referee Freeman, in his oral decision, cited three early decisions of the Washington State Supreme Court which he believed to have implicitly upheld the constitutionality of the Washington homestead-exemption statutes. A reading of those decisions and the briefs

on appeal in them, however, will clearly show that the Referee was mistaken. To our knowledge, the only case ever to raise the constitutional question involved in the present case was a case decided by a federal district court in Georgia, which, for certain reasons, is distinguishable from the present case.

The present case is the first to call for a determination of whether the test applied in Constitutional-rights-cases will also be applied in fundamental-rights-cases.

A strict test was laid down by a federal district court in New York State, in the case of Rothstein v. Wyman, 303 F.Supp. 339 (1969), pp. 346-347 [5], in the following words: "Where legislative classifications create inequalities affecting the exercise of fundamental or critical personal rights, however, a more stringent standard is applied in determining whether such distinctions are prohibited by the Equal Protection Clause. . . "Such a law . . . will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy. . . The standard has more recently been described . . . as . . . whether the statute "promotes a compelling state interest." . . ."

In the same case, the court, at [6,7], went on to hold that the "receipt of welfare benefits" is a fundamental, or critical, personal right.

The Rothstein court thus made the strict test applicable to all cases involving "fundamental or critical personal rights", even where those rights did not quite attain Constitutional stature. This question, in our opinion, has not been reached by the Supreme Court, which has hitherto considered only those cases which clearly involved Constitutional rights.

In some of its recent decisions, the Supreme Court, at first sight, may have given the appearance of having considered --and rejected--the question and doctrine involved in Rothstein. It was, indeed, by relying on those recent decisions, that the Court of Appeals deemed itself able to reject the contentions of Mr. Statham (since, presumably, the right to a homestead-exemption is not derived from the Constitution). We think, however, that the Court of Appeals was not justified in its interpretation of the four Supreme Court decisions on which it relied. Let us, briefly, examine the holdings in those four decisions:

(1) McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961) involved a prosecution for violating the Maryland Sunday Closing Laws by selling merchandise on Sunday. The Supreme Court rejected the contention that such laws violated the Equal Protection of the Laws Clause, but it was much more interested in the question of whether such laws constituted the estab-

lishment of religion in violation of the First Amendment. Regarding equal protection (p. 399), it applied a minimal test--as befits a case involving mere economic regulation.

(2) In Richardson v. Belcher, 404 U.S. 78, 30 L.Ed.2d 231, 92 S.Ct. 254 (1971), the federal government, in pursuance of a rather peculiar "offset" provision of the Social Security Act, reduced its disability payments to a family-head by the amount he was simultaneously receiving under State Workmen's Compensation. In finding no discrimination, the Supreme Court applied a minimal test--without discussion of the matter of fundamental personal rights. (Two dissenting opinions were written.)

(3) Dandridge v. Williams, 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970) (reh. den.), concerned a Maryland statute affecting about 1/13 of the families receiving federal aid for dependent children, which imposed a maximum monthly limit of $250 on the total amount which could be received by any one family. The Supreme Court (at pp. 484-485) wanted to apply a strict test, but was unable to find a basis for doing so, since no Constitutional rights were involved. It did not discuss the matter of whether any fundamental personal rights were involved. (There were two dissenting opinions.)

(4) In United States v. Kras, 409 U.S. 434, 41 U.S. Law Week 4117, CCH U.S.

Supreme Court Bulletin, 1972-1973 Term, Vol. 1, p. 595 (January 10, 1973), an unemployed, impoverished family-head on public assistance was denied the right to obtain a discharge in bankruptcy, because he could not promise even to pay as little as $1.28 per week, as installment-payments on the $50-filing fee. It was the decision of the Supreme Court (at p. 606) that, in contrast to the right to obtain a divorce, the right to obtain a discharge in bankruptcy "does not rise to the same constitutional level." (We note, parenthetically, that Mr. Statham has already obtained his discharge in bankruptcy and now seeks only whatever exemption from execution by creditors would be sought by all debtors, under general law.) Again, the Supreme Court failed to consider the possibility that a different result might be reached if the right to obtain a discharge in bankruptcy were shown to be a fundamental personal right. In the course of one of the three dissenting opinions, a statement was made (at p. 621) which is so poignant as to deserve quotation here:

> "...
>
> "The Bankruptcy Act relieves 'the honest debtor from the weight of oppressive indebtedness and [permits] him to start afresh, free from the obligations and responsibilities consequent upon business misfortunes,' Williams v. United States Fidelity and Guaranty Co., 236 U.S. 549, 554-555.

> It holds out a promise to the debtor of "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244. Yet the Court today denies that promise to those who need it most, to those who every day must live face-to-face with abject poverty--who cannot spare even $1.28 a week.
>
> "The Court today holds that Congress may say that some of the poor are too poor even to go bankrupt. I cannot agree."

We can find nothing in the above-described four decisions which could convince us that the Supreme Court has rejected the Rothstein doctrine that a "fundamental" right entitles its bearer to the same strict test as does a "Constitutional" right. On the contrary, we believe that, prior to the present case, this Court has never been called upon to judicially reach a determination as to this matter. We now ask the Court to do so.

In the present case, the Court of Appeals, in a footnote in its opinion, sought to make a comparison by pointing to what it regarded as a true case for application of the strict test. That was the case of Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), in which the right of a dependent illegitimate child to recover workmen's-compensation benefits for the death of its father was held to be a "sen-

sitive and fundamental personal right", enabling this Court to apply a strict test. Thus, perhaps without even recognizing it, this Court instinctively applied the strict test, to protect the fundamental right of a child to recover for the death of its father, without pausing to decide whether such right is derived from the Constitution. And it indicated it would do the same thing in the case of "fundamental freedoms", in Eisenstadt v. Baird, 31 L.Ed.2d 349, 405 U.S. 438, 92 S.Ct. 1029 (1972), at p. 359, n. 7.

Is it not, likewise, the fundamental personal right of every debtor to have a place of his own to sleep in at night, which his creditors are forbidden to seize?

CONCLUSION

Petitioner prays that this Court issue a writ of certiorari to the U. S. Court of Appeals for the Ninth Circuit to review the judgment and opinion of that court; and that, on hearing, this Court reverse that judgment and direct the entry of a judgment granting Petitioner a homestead exemption in the maximum amount of $6,000 and allowing his objections to the sale of his property, and disallowing the Amended Trustee's Report of Exempt Property.

APPENDIX

The three Washington homestead-exemption statutes not yet quoted in this Petition (R.C.W. 6.12.010, 6.12.050, and 6.12.090) are now quoted, respectively, as follows:

> "Homestead, what constitutes. The homestead consists of the dwelling house, in which the claimant resides, with appurtenant buildings, and the land on which the same are situated, and by which the same are surrounded, or land without improvements purchased with the intention of building a house and residing thereon, selected at any time before sale, as in this chapter provided. [1945 c 196 s. 1. . . .]"

> "Value of homestead limited--Must be used as home. Homesteads may be selected and claimed in lands and tenements with the improvements thereon, as defined in RCW 6.12.010, regardless of area but not exceeding in net value, of both the lands and improvements, the sum of six thousand dollars. The premises thus included in the homestead must be actually intended or used as a home for the claimants, and shall not be devoted exclusively to any other purpose. [1955 c 29 sec. 1. . . .]"

> "Homestead exempt from execution, when. The homestead is exempt from attachment and from execution or forced sale, except as in this chapter provided. . . [1945 c 196 s. 2.]"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In the Matter of CECIL STATHAM, Bankrupt.	
CECIL STATHAM, *Bankrupt-Appellant,* vs. E. STANLEY RIDDLE, JR., *Trustee-Appellee.*	No. 72-1260 OPINION

[August 7, 1973]

Appeal from the United States District Court
Western District of Washington

Before: CHAMBERS, CARTER and GOODWIN, Circuit Judges.

JAMES M. CARTER, Circuit Judge.

Appellant Statham attacks the constitutionality of the Homestead Laws of the State of Washington under the Equal Protection Clause of the Fourteenth Amendment.

On August 16, 1970, appellant, a single man without dependants, recorded a declaration of homestead on real property in the State of Washington. The following day, August 17, 1970, he filed a voluntary petition in bankruptcy and was adjudicated a bankrupt. Thereafter he claimed the real property as exempt under Washington law. The Bankruptcy Act allows exemptions provided by State law, Section 6 of the Act, 11 U.S.C. § 24.

The claim was disallowed by the trustee and the referee, and a petition for review was denied by the district court.

Statutes of the State of Washington permit a homestead to be selected by an unmarried person who is the head of a family.

R.C.W. 6.12.020. "Head of a Family" is defined as a person who has residing on the premises with him [or her] and under his [or her] care and maintenance various relations listed therein. R.C.W. 6.12.290(2)(a) through (e).

R.C.W. 6.12.290(1) lists as the head of a family:

> "The husband or wife, when the claimant is a married person; or a widow or widower still residing upon the premises occupied by her or him as a home while married."

Otherwise, a single person is not included as eligible for a homestead.

In the field of economics and social welfare, legislation does not violate the Equal Protection Clause of the Fourteenth Amendment if "[T]he State's action be rationally based and free from invidious discrimination." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (Aid for Dependent Children); Accord *McGowan v. Maryland*, 366 U.S. 420, 425-28 (Sunday Blue Laws).

In *United States v. Kras*, 409 U.S. 434, 446 (1973) the court held that "[B]ankruptcy legislation is in the area of economics and social welfare. . . . This being so, the applicable standard, in measuring the propriety of Congress' classification, is that of rational justification." (Citing *Dandridge, supra, inter alia.*) The Court also held there was no due process or equal protection right to a discharge in bankruptcy without payment of the required filing fees. The Court rejected Kras' claim that bankruptcy involved a fundamental interest and represented the sole means of discharging one's debts, at least for the poor. The Court said, "We see no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy." *Id.* at 445. And further, "There is no constitutional right to obtain a discharge of one's debt in bankruptcy." *Id.* at 446. See *Richardson v. Belcher*, 404 U.S. 78 (1971) (Social Security Act).

We hold that the State of Washington, in its statutes concerning homesteads, had a rational basis for the legislation and its treatment of a single person without dependents.[1] By reason-

[1]That classification does not endanger a fundamental personal right. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (legitimacy).

able inference from the scheme of the Washington statutes, they evince a legislative purpose to protect the "family" from loss of its homestead in case of economic distress. Appellant argues that the scheme instead exists to protect not only the family, but the individual debtor himself—including single debtors without dependants such as appellant. We cannot agree. The "head of a family" and his family are clearly the persons protected, defined broadly to include certain dependents not members of one's immediate family.

Appellant points out that the statute does protect single persons without dependents, who also happen to be widow(er)s still living in the former marital domicile. We think that protection of the former family, one of whose members has died, from the loss of the homestead at such a tragic time, constitutes a rational basis for differentiating between widow(er)s and other single persons without dependents who by definition would not be subject to such a loss.

The judgment is affirmed.

Following is a quotation of the Judgment Affirming Judgment of Referee (Tr. 139), entered by the District Court, in the present case, on December 14, 1971:

This matter having come on regularly for hearing this 26th day of November, 1971, upon the petition for Review of a Judgment, dated February 8, 1971, by Frank R. Freeman, Referee in Bankruptcy, the bankrupt appearing by his attorney, Jack Steinberg, and the trustee in bankruptcy, W. Stanley Riddle, Jr., appearing, and the Court having read the briefs of bankrupt and trustee; and

having heard the oral arguments of bankrupt and trustee, the court finds:

That what the bankrupt herein desires, a homestead exemption for single persons, may be socially desirable, but the Washington homestead laws are not unconstitutional as being a violation of the United States Constitution 14th Amendment Equal Protection Clause. Washington courts have held that homestead exemption laws are for the protection of the family, the legislature having a reasonable basis for excluding single persons from the class of persons covered by the homestead exemption.

The case of McGowan vs. Maryland, 366 U.S. 420, 6 L.Ed. 2nd 393, 81 S Ct. 1101 (1961) sets forth a test for classifications in statutes that are permissable under the 14th Amendment. The court held at 425-26: "Although no precise formula has been developed, the court has held that the 14th amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the states objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

It is reasonable to exclude single persons from coverage of the homestead exemption law, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Findings of Fact, Conclusions of Law, and Judgment of Frank R. Freeman, Referee in Bankruptcy herein, are affirmed.

Following is a quotation of the Judgment (omitting the legal-description of the property) of Frank R. Freeman, Referee in Bankruptcy, as contained in his Findings of Fact, Conclusions of Law and Judgment, entered on February 8, 1971:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Referee in Bankruptcy of the above-entitled court has jurisdiction over this matter and that W. Stanley Riddle, Jr., trustee in bankruptcy for Cecil Statham, is the owner of the below described real property, subject only to valid encumbrances thereon and free of the claim of homestead of the bankrupt herein, Cecil Statham. The objections of the bankrupt to the sale of the property in question by the trustee are hereby denied. The Amended Trustee's Report of Exempt Property specifically disallowing the bankrupt's claim of homestead upon the below described real property is hereby approved and the trustee herein is directed to proceed as he is best able to liquidate said property as an asset of the above-entitled bankruptcy estate. The property in question is legally described as follows

Sept. 18, 1973 Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

October 8, 1973

Respondent, W. Stanley Riddle, Jr., prays that a writ of certiorari not issue, and that the judgment and opinion of the U.S. Court of Appeals for the Ninth Circuit in this case on August 7, 1973, be allowed to stand.

REASONS FOR DENYING THE WRIT

The Respondent is in agreement with Petitioner's statements in his petition regarding jurisdiction , questions presented, constitutional and statutory provisions involved and his statement of the case. However, the writ should be denied.

Petitioner appears to rely on a District

Court case, Rothstein vs. Wyman, 303 F. Supp. 339 (1969) for much of his argument that a fundamental right, to which the strict test should be applied. However, the Rothstein case was vacated and remanded in Commissioners of Social Services of New York et al vs. Rothstein, 398 U.S. 275 (1970). The Supreme Court, in a short opinion, held at 276-277:

> ". . . the judgment of the District Court is vacated and the case is remanded to that court for an opportunity to pass on the propriety of granting interim relief in accordance with conventional equitable principles on the basis of appellee's statutory claims, or, if the question is reached, continuing the present injunction in light of this courts decision in Dandridge vs. Williams, 397 U.S. 471 (1970)."

Further proceedings in the Rothstein case are reported in 336 F. Supp. 328, and 467 F 2d 226. However, nowhere in proceedings in the Rothstein case since the case was first reported in 303 F. Supp. 339 (1969) does a court make the statement that the receipt of welfare benefits is a fundamental, or critical personal right, or that the strict scrutiny test should apply. This lack of reliance

on the strict scrutiny test - fourteenth amendment argument in subsequent Rothstein case proceedings was made necessary by the ruling in Dandridge vs. Williams, supra.

In Dandridge, it was contended that because the state's classification (family size) injuriously treated welfare recipients statutory entitlements to the necessities of life, a "strict scrutiny" test should be applied. It was argued that the very necessities of life are as important as the interests protected by fundamental rights. In effect, the court was asked to find either that there was some kind of fundamental right to the necessities of life or that the strict scrutiny test was to be applied in cases involving important personal interests, not readily cognizable as constitutional rights, as well as cases involving fundamental rights. The majority, through Justice Stewart, found that such a holding would be unmanageable. Dandridge has settled what had not been given definitive legal treatment. The Dandridge view was upheld in Lindsey vs. Normet, 405 U.S. 56 (1972), in which the court rejected the proposition

that the need for decent shelter or the right to maintain peaceful possession of one's home were fundamental interests entitled to strict scrutiny review. It was further re-confirmed in Ortwein vs. Schwab, 93 S. Ct. 1172 (1973), in which the court held that appellate court filing fee requirements do not deny due process or equal protection to appellants unable to pay them.

If there was any remaining doubt as to the expansibility of the list of fundamental rights, the Court has removed it in San Antonio Independent School District vs. Rodriguez, 93 S. Ct. 1278 (1973). Because the public education was supported by local property taxes, school districts with a low property tax base, allegedly those where minority group members and poor persons resided, could not spend as much per pupil for education as wealthier districts. The district court found neither compelling interest nor reasonable basis for the classification, found education to be a "fundamental" interest, and held the system unconstitutional. The Supreme Court recognized that education may be the most important function of local government, but reversed

the district court, holding at 1297:

> "The lesson of these cases in addressing the question now before the court is plain. It is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence housing (referring to Dandridge and Lindsey vs. Normet). Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the constitution."

The majority could not find education a right so guaranteed, and refused to apply the strict scrutiny test.

In United States vs. Kras, 409 U.S. 434, 446 (1973) the court held that "Bankruptcy legislation is in the area of economics and social welfare. . . This being so, the applicable standard, in measuring the propriety of Congress' classification, is that of rational classification." (Citing Dandridge, supra, inter alia.)

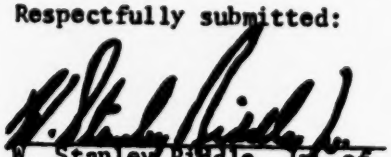
It appears clear, moreover, that the Supreme Court has rejected Rothstein, as it has rejected

the idea that education is a fundamental interest, entitled to strict scrutiny protection. In the cases which I have cited herein, I believe that the Supreme Court has rejected the idea that the petitioner should be entitled to the homestead exemption as a fundamental right, or interest, or that the strict scrutiny test should be applied.

CONCLUSION

Respondent prays that this court deny the petition for writ of certiorari.

Respectfully submitted:



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